Supreme Court, U.S.
FILED

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No._____

IN THE

SUPREME COURT OF THE UNTIED STATES

OCTOBER TERM, 1998

JAMES JAGGERS

Petioner,

v.

WEST VIRGINIA HUMAN RIGHTS COMMISSION and
RAVENSWOOD ALUMINUM CORPORATION

Respondents.

Petition for Writ of Certiorari to the
West Virginia Supreme Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Brent E. Beveridge, Esq.
Beveridge Law Offices
208 1/2 Adams Street
P.O. Box 1469
Fairmont, WV 26555-1469

3988

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied due process of law afforded by the Fourteenth Amendment of the United States Constitution by the West Virginia Human Rights Commission improperly applying the burden of persuasion.

2. Whether the petitioner was denied due process of law afforded by the Fourteenth Amendment of the United States Constitution by the West Virginia Attorney General's office appearing in the proceedings as an advocate and an adversary.

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Fairmont, WV 26555-1469
(304) 363-1907
Attorney for Petitioner

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Brent E. Beveridge, Esq.
Beveridge Law Offices
208 1/2 Adams Street
P.O. Box 1469
Fairmont, WV 26555-1469
(304) 363-1907
Attorney for Petitioner

Petitioner James O. Jaggers prays that a Writ of Certiorari issue the judgment order of the West Virginia Supreme Court of Appeals, entered on September 17, 1998.

OPINION OF THE COURT BELOW

The judgment order of the West Virginia Supreme Court of Appeals is found in Appendix A to this Petition.

JURISDICTIONAL STATEMENT

The September 17, 1998 order of the West Virginia Supreme Court of Appeals (Appendix A) refused a Petition for Appeal of an Order of the Marion County, West Virginia Court (Appendix B) entered on May 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The questions presented in the instant petition are legal in nature. The following statement provides a concise overview of the factual and procedural background upon which the present issues are predicated.

On December 4, 1992, Appellant James O. Jaggers filed an "Employment Complaint Background Information Form" with the West Virginia Human Rights Commission. The complaint

information form completed by Mr. Jaggers in his own handwriting formed the basis for a memorandum of complaint filed by the commission on December 11, 1992.

An amended complaint drafted by Human Rights Commission personnel was filed with the Commission on January 8, 1993, alleging unlawful discrimination arising out of Mr. Jaggers' termination from Ravenswood Aluminum Corporation on June 15, 1992.

The amended complaint was dismissed without prejudice by an order entered on October 25, 1996, pursuant to respondents summary judgment which found as a matter of law that the respondent had terminated all of its hourly employees.

The Commission filed a second amended complaint alleging a discriminatory denial of a promotion. The case proceeded to hearing before the Honorable Mike Kelly, Administrative Law Judge, on December 23, 1996.

Complaint/Petitioner James O. Jaggers was represented by the Attorney General's Civil Rights Division and the Respondent Ravenswood Aluminum Corporation was represented by private counsel.

A Final Decision dated October 30, 1997, was filed by the Administrative Law Judge finding in favor of the respondent, and by an order entered on October 30, 1997, the complaint filed by James O. Jaggers against Ravenswood Aluminum Corporation was dismissed. (Attached as Appendix B)

A timely appeal of the Administrative Law Judge was filed with the West Virginia Human Rights Commission on February 10, 1998.

A final order of the West Virginia Human Rights Commission was entered on May 28, 1998 upholding without modification or amendment the decision of the Administrative Law Judge and thereby dismissing the Petitioner's Complaint. (Attached as Appendix C)

The commission dismissed this action based upon the

following rulings of the Administrative Law Judge:

1. This action is barred by the 180 day limitations period for filing a complaint which was in effect at the time this action was filed on December 11, 1992.

2. The complaint failed to carry his burden of persuasion by a preponderance of the evidence that age was a factor in the respondent's failure to promote the complainant.

A Petition for Appeal was filed on July 14, 1998 with the West Virginia Supreme Court of Appeals. The Supreme Court of Appeals refused the Petition for Appeal by an order entered on September 17, 1998 without an opinion.

The stipulated facts are set forth in the Final Order of the Human Rights Commission attached as Appendix B.

Additionally, the facts establish that James O. Jaggers was a fifty-seven year old male when he filed a Memorandum of Complaint pro se with the Human rights Commission on December 11, 1992. Mr. Jaggers' initial complaint alleged that he was terminated from Ravenswood Aluminum Corp. on June 15, 1992 because of his age in violation of the West Virginia Human Rights Act, West Virginia Code § 5-11-10.

The initial complaint was dismissed on the employer's summary judgment motion by an order entered on October 25, 1996. The basis for the summary judgment motion was that Mr. Jaggers was a replacement worker during a labor dispute and all replacement workers were terminated on June 29, 1992 when the union workers returned. the summary judgment motion was granted without prejudice and a second amended complaint was filed by the Commission alleging that Mr. Jaggers had been denied a promotion prior to his June 29, 1992 termination.

There was a factual dispute on the date that the 180 day limitation period began to run the denial of the promotion. Jaggers contended that he was not notified that another employee, Roger Linkous, was promoted to the foreman's position until mid-June 1992 and that his December 11, 1992 complaint was timely.

Ravenswood contended that the selection of Roger Linkous was announced on May 22, 1992 and hence the December 11, 1992 complaint was some 23 days too late.

The Administrative Law Judge made a legal determination that the 180 day filing limitation in effect at the time of the filing of the complaint on December 11, 1992 applied. A factual determination was made that the time period began to run on May 22, 1992 and ended on November 18, 1992.

The complainant contended and offered credible evidence that he did not receive notice of the denial of the promotion until mid-June 1992. The respondent contended that the complainant was notified that another employee had been selected for the promotion to the position of foreman at a meeting held on May 22, 1992.

The Administrative Law Judge concluded as a matter of law that the complainant was notified of the adverse personnel action on May 22, 1992. this conclusion was reached on a factual issue which the Administrative Law Judge considered a"a very close question".

The Administrative Law Judge considered evidence from both parties concerning the basis for the decision of selecting a 32 year old employee for the position of foreman over the 57 year old complainant.

The evidence can be fairly summarized as showing that Craig Moore, a supervisor in the Green Carbon Department of Ravenswood Aluminum Corporation, selected Roger Linkous, an hourly employee for a foreman's position The only two persons in the department considered for the position were complainant James O. Jaggers, age 57, and Linkous, age 32. Mr. Moore considered Linkous and Jaggers to be the top two employees that he had supervised in the plant.

Mr. Moore had previously selected Mr. Jaggers as an up-grade or fill-in foreman and indicated that the position of up-grade foreman was usually filled by the best available employee. The

evidence further indicated that Jaggers had performed the duties as an upgrade foreman successfully and had gained experience as a foreman prior to Linkous' promotion to the position.

Linkous was selected over Jaggers on the basis of Moore's subjective evaluations of the two employees.

REASON FOR GRANTING THE WRIT

Supreme Court Rule 19 (c) sets forth, as a reason for granting certiorari, that a state court has decided an important federal question in a was that conflicts with applicable decisions of this Court and the Constitution of the United States.

A. BURDEN OF PERSUASION

The process by which the quantity and quality of proof in an employment discrimination case is analyzed has resulted in boundless judicial pronouncements on the burdens of proof and persuasion.

Petitioner has been denied due process of law as secured by Section 1 of the Fourteenth Amendment of the United States Constitution by the Administrative Law Judge's failure to properly analyze and apply the burden of persuasion pursuant to Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67L.Ed.2d 207 (1981)

Initially, Courts must assess whether the employee has established a prima facie case of discriminatory employment action. A prima facie case creates a presumption of discrimination by satisfying the three parts test found in Conaway v. Eastern Associated Coal Company 178 W. Va. 164, 358 S.E.2d 423(1986): "In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code §5-11-1 et seq. (1979), the plaintiff must offer proof of the following:

(1) That the plaintiff is a member of a protected class;

(2) That the employer made an adverse decision concerning the plaintiff;

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Conaway, 358 S.E.2d at 429; see also Kanawha Valley Regional Transportation Authority v. West Virginia Human Rights Commission, 181 W. Va. 675, 383 S.E.2d 857,860 (1989)."

Once the prima facie case is established by the employee, the burden of production shifts to the employer to offer a rebuttal to the presumption by producing evidence that the employee was rejected, or someone was preferred for a legitimate nondiscriminatory reason. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). The employer's explanation "must be clearly and reasonably specific", id at 258, and "must be legally sufficient to justify a judgment for the defendant". id at 254.

The Administrative Law Judge's decision does not specify as to where in the burden of proof analysis the complainant's proof failed. It is reasonable to conclude that the complainant made a prima facie case since the adverse decision did not occur by a summary judgment or by a direct verdict. Apparently, the complainant failed to satisfy the ultimate burden of persuasion. The Administrative Law Judge was clearly wrong in reaching this conclusion because the alleged legitimate nondiscriminatory reasons offered by the respondent lacked the clear and reasonably specific explanation as required by Burdine, id at 258.

The Administrative Law Judge's decision extensively considered the employer's subjective opinion of the relative abilities of Mr. Jaggers and Mr. Linkous to serve as foreman. The opinions

were first based upon personnel evaluations. the analysis of the evaluations presented very little distinction between their relative abilities. Ultimately the employer's preference of Mr. Linkous hinged on one supervisor's subjective assessment that Linkous "handled himself better in a pressure situation', and Mr. Jaggers 'was a little bit' insecure in his decision making ability'."

Mr. Moore, the supervisor upon whose testimony the selection of Linkous was justified, alluded to one specific instance where Jaggers "kind of froze". His assessment that Linkous handled himself better in a pressure situation was a general conclusion unsupported by specific events. Mr. Moore's conclusion that Jaggers "kind of froze" was also refuted by comments in his evaluations that Mr. Jaggers wasn't afraid to make decisions.

The distinguishing subjective assessments made by Mr. Moore must be weighed against the objective evidence that Mr. Jaggers had competently served as a fill-in or upgrade foreman if the burden of persuasion s is to be properly analzyed under the "clear and reasonably specific" standard set forth in Burdine, id. A promotion decision based upon an assessment that Linkous "handled himself better" is insufficient according to Nation v. Winn-Dixie Stores, Inc. 570 F.Supp. 1473 (D.C. Ga. 1983); Farber v. Massilon Board of Education, 917 F.2d 1391 (6th Cir. 1990); and Miles v. M.N.C. Corp., 750 F.2d 867 (11th Cir. 1985).

In Nation the District Court held that an employer 's assessment that the selected employee had a good attitude. took pride in his work, etc. does not meet Burdine's requirement that Defendant articulate a 'clear and reasonably specific' nondiscriminatory reason for its personnel decision. Nation, id at 1475. In Farber, the Sixth Circuit found that an employer's characterization that the promoted employee had a certain "chemistry" for the position failed to satisfy the specific non-discriminatory reason. Farber, id at 1399. Miles involved the type of subjective evaluations used by the respondent in this instance. the evaluations based upon vague non-specific criteria were held to

be insufficient to uphold a claim of legitimate non-discriminatory reason in recalling one employee as opposed to another. Miles id at 871.

When the employer's proffered reasons that Mr. Linkous handled himself better in pressure situations and Mr. Jaggers kind of froze when confronted with a difficult situation are carefully scrutinized, the Administrative Law Judge had no choice but to include that the proffered reasons lacked clarity and specifity. If the employer chooses to base the decision upon subjective criteria, the subjective evidence must by strictly scrutinized to determine whether it is a pretext for discrimination. Love v. Alamance County Board of Education, 757 F.2d 1504, 1507 (4th Cir.1985) Although subjective assessments are to be strictly scrutinized, they may be afforded weight to support a nondiscriminatory reason if they are supported by corroborating objective evidence. Lone, id. In this instance, there is no corroborating objective evidence to support the employer's position. Jaggers and Linkous were hired at the same time. their written personnel evaluations were essentially equal.

One objective factor which clearly preponderates in favor of the complainant is the fact that Jaggers was selected and worked as an upgrade foreman. Logic would dictate that the best available hourly employee was chosen for this position. He remained in the position and the employer offered no evidence to contradict its prior determination that Jaggers was the best employee available for the foreman's position.

B. DENIAL OF DUE PROCESS BY THE ADMINISTRATIVE TRIBUNAL

Petitioner's case was decided by the West Virginia Human Rights Commission. Jaggers was represented before the Human Rights Commission by an Assistant Attorney General of the State of West Virginia.

Pursuant to the statutory scheme of the West Virginia Human Rights Act, West Virginia Code §5-11-1 et seq., the Human Rights Commission must be designated as a respondent in the appeal to the West Virginia Supreme Court of Appeals. the West Virginia Attorney General's office which had represented the Petitioner before the Commission becomes his adversary in the proceeding before the Supreme Court as counsel for the Human Rights Commission.

In this instance, the Attorney General filed a written response in opposition to the petition for an appeal. Fundamental due process is violated by the West Virginia statutory scheme by which a citizen's adversary before the appellate tribunal. Withdraw v. Larkin, 421 U.S. 35, 95 S. Ct. 1456, 43L.Ed. 712 (19).

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,
Brent E. Beveridge, Esq.
208 1/2 Adams Street
Fairmont, WV 26555-1469

Counsel for Petitioner

STATE OF WEST VIRGINIA

At a regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 17th day of September, 1998, the following order was made and entered:

James O. Jaggers, Petitioner

vs.) No. 981990

The West Virginia Human Rights Commission and Ravenswood Aluminum Corporation, Respondents

On a former day, to-wit, July 14, 1998, came the petitioner, James O. Jaggers, by Brent E. Beveridge, his attorney, and presented to the Court his petition praying for an appeal from a final order of the West Virginia Human Rights Commission rendered on the 28th day of May, 1998, with the record accompanying the petition. thereafter, on the 4th day of August, 1998, came the respondent, Ravenswood Aluminum Corporation, by Bowles, Rice, McDavid, Graff & Love, Ricklin Brown and Maria W. Hughes, its attorneys, and presented to the Court its written response in opposition thereto. Finally, on the 5th day of August, 1998, came the respondent, the West Virginia Human Rights Commission, by Darrell V. McGraw, Jr., Attorney General, and John McFerrin, Assistant Attorney General, its attorneys, and presented to the Court its written response in opposition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy

Attest:_____

Clerk, Supreme Court of Appeals

BEFORE THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES O. JAGGERS,

Complainant,

v. Docket No. EA-225-93

RAVENSWOOD ALUMINUM CORP.

Respondent.

FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

THIS MATTER matured for public hearing on 23 December, 1996, at the offices of the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, Kanawha County, West Virginia. the Complainant appeared in person and his case was presented by the West Virginia Human Rights Commission and its counsel, Assistant Attorney General Sandra K. Henson. The respondent appeared by its representative, Craig Moore, and by its counsel, Ricklin Brown and Bowles, Rice, McDavid, Graff & Love, with Maria W. Hughes appearing on the brief.

In making this decision, I reviewed and considered the transcript of hearing, all exhibits, and the post-hearing submissions of counsel.

I. PROCEDURAL HISTORY

On 11 December 1992 the West Virginia Human Rights Commission filed a memorandum of complaint on behalf of James O. Jaggers. A memorandum of complaint, in lieu of a

complaint containing the verified signature of complainant, is authorized by HRC Procedural Rule 3.9.4.C. The effect of a memorandum of complaint is to toll the running of the statutory filing period pending the filing of a formal complaint "received by the Commission subsequent to and based upon said memorandum of complaint shall be deemed filed as of the date that the said memorandum of complaint" was signed and verified by the Commission was based on information contained in an "Employment Complaint Background Information" form completed by Mr. Jaggers in his own handwriting and filed with the Commission on 4 December 1992.

This case originally proceeded to hearing on the basis of an amended complaint filed with the Commission on or about 8 January 1993. The amended complaint, as drafted by HRC personnel, accused respondent of unlawfully discriminating against Mr. Jaggers because of his age when it terminated his employment on or about June 15, 1993. At the appropriate time, respondent filed a motion to dismiss and a motion for summary judgment on the ground that it terminated all of the 904 hourly workers it employed on 15 June 1993, a majority of whom were younger than Mr. Jaggers . On 25 October 1996. I entered an Order granting respondents motion for summary judgment and dismissing the case without prejudice.

Subsequently, the Commission filed a second amended complaint, this one focusing on a promotion that was denied to Mr. Jaggers while he was still employed by respondent. I have previously found, and now reaffirm, that the denial of a promotion, not his discharge, was the alleged discriminatory act which motivated Mr. Jaggers to seek relief from e Commission. Since the promotion denial was clearly set forth in the background information sheet completed by complainant, it would have been error to dismiss the complaint with prejudice because of the Commission staff's mistake in pleading a wrongful discharge cause of action. *Osborne v. WVHRC*, 184 w.

A. 584, 402 S.E. 2d 253 (1991). Respondent's motion for summary judgment on the second amended complaint was denied due to the existence of genuine issues as to material facts regarding whether the memorandum of complaint was filed within 180 days after Mr. Jaggers received notice that a younger man had been selected over him for the position of foreman.

Thus, this case proceeded to hearing on the second amended complaint.

II. ISSUES TO BE DECIDED

A. Whether this action is time-barred due to complainant's failure to file a complaint within 180 days after receiving unequivocal notice that he had not been selected for promotion.

B. Whether respondent violated W. Va. Code §5-11-9(1) by discriminating against complainant because of his age when it selected a younger employee for promotion to the position of foreman.

III. FINDING OF FACTS

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the transcript of the proceedings, the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts

to be true.[1]

A. STIPULATED FACTS

The parties stipulated that the following facts are true:

1. Complainant James O. Jaggers is a sixty-two year old man (date of birth May 19, 1935) who resides in Parkersburg, West Virginia. Mr. Jaggers filed an age discrimination complaint against the respondent under the West Virginia Human Rights Act alleging that the respondent failed to promote him to a salaried foreman's position based upon unlawful considerations of his age.

2. Respondent Ravenswood Aluminum Corporation is a person and an employer as those terms are defined by W. Va. Code, §§ 5-11-3(a) and 5-11-3(d), respectively.

3. Complainant James O. Jaggers worked for the Respondent as an hourly replacement worker from November 9, 1990, through June 29, 1992. the respondent assigned him to work in the Green Carbon Department. Mr. Jaggers' employment as an hourly replacement worker was terminated on June 29, 1992. pursuant to a written settlement agreement between the United Steelworkers Union and Ravenswood Aluminum Corporation.

4. Between May 17, 1991[2], and May 14, 1992, Craig

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[1]To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, to the extent that they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issue as presented.

[2]Despite the stipulation that Mr. Jaggers served as leadperson beginning in May 1991, respondent's records show that he first served in this position in March 1991.

Moore, with the help of Don Hamon, selected Mr. Jaggers to serve as leadperson for his crew when one of the two regular Green Carbon Department foremen were absent. Mr. Jaggers was the only hourly employee in the Green Carbon Department to serve as leadperson from May 17, 1991, through May 14, 1992.

5. On December 17, 1990, the respondent hired Roger Linkous as an hourly replacement worker. Mr. Linkous' date of birth is February 16, 1960. The respondent assigned Mr. Linkous to work in the Green Carbon Department.

6. On or around May 231, 1992, Craig Moore offered Mr. Linkous a promotion to a salaried foreman's position at a monthly salary of $2,500.00. Mr. Linkous accepted the promotion on May 22, 1992. the effective date of the promotion was May 26, 1992.

7. Mr. Linkous has worked for the respondent continuously from December 17, 1990, through present.

8. The respondent recalled Mr. Jaggers to work from a preferential rehire list on Aprii 15, 1993.; Since April 15, 1993, Mr. Jaggers has worked for the respondent as an hourly employee.

B. MR. JAGGERS' WORK PERFORMANCE

9. Mr. Jaggers was a "replacement worker" hired by respondent to work at its Jackson County, West Virginia facility during a prolonged and bitter labor dispute with the United States Steelworkers, the bargaining agent for RAC's hourly employees. the labor dispute lasted from 1 November 1990 until June 1992. when the USW members returned to work.

10. In March 1991, some four months after he was hired as a

replacement worker, Mr. Jaggers was selected to serve as "leadperson" or "upgrade foreman". The purpose of this position is to fill in for a foreman who is on annual leave or sick leave, etc. The selection of Mr. Jaggers was made by his foreman, Craig Moore. Mr. Moore admitted that he would want only his best employees to serve as foreman.

11. Pursuant to his selection as upgrade foreman, complainant attended safety and accident prevention training for management personnel and "shadowed" Mr. Moore and Ed Miller, another foreman, so he could learn the various duties and responsibilities of a foreman.

12. Mr. Jaggers admits that he was never promised a promotion to a permanent salary position, though he alleges that he was told that he would be "firs-in-line" for promotion should a position become available.

13. A few months after he selected Mr. Jaggers to be upgrade foreman, Mr. Moore was injured and was off the job for about three weeks. Mr. Jaggers filled in for him. Upon Mr. Moore's return with his arm in a sling, complainant assisted him in carrying out his foremen duties.

14. Whenever he was upgraded to foreman, Mr. Jaggers would get additional pay of $0.75 per hour. He received the supplemental compensation only for the actual time that eh spent working as a foreman.

15. Respondent's record indicate that complainant worked as an upgrade foreman on the following days: March 19-24, 1991; June 1-7, 1991; June 11-17, 1991; June 20-26, 1991; July 2-5, 1991; July 10-12, 1991; July 14, 1991; August 27-30, 1991; September 5-7, 1991; September 9, 1991; September 11-12, 1991;September 14, 1991; September 16-17, 1991; September 18-19, 1991; September 21-27, 1991; October 4, 1991; October

7, 1991; October 10, 1991; October 12-14, 1991; November 1-2, 1991; November 9, 1991; November 11, 1991; November 28-29, 1991; December 2, 1991; December 7-8, 1991; December 14-18, 1991; December 26-30, 1991; January 2-6, 1992; January 24, 1992; February 1-3, 1992; February 9, 1992; March 28, 1992; May 5, 1992; and May 14, 1992.

16. Complainant received numerous performance evaluations between the date of his employment and his termination in June 1992. All the evaluations are done on a form that rates five areas of performance[3] by one of three standards[4] with an opportunity for the foreman to make additional comments. The evaluations admitted into evidence show as follows:

(a) The January 3, 1991 evaluation done by Mr. Moore has five "above average" ratings and this comment"Emplioyee doing a fine job on press. Takes care of the small details to keep the press running smooth. Self starter. Needs to work on how to train others," (Emphasis in original):

(b) The 8 January 1991 evaluation by Mr. Moore has five "above average" ratings and this comment "Good Man. Needs little or no supervision. Working on being a better trainer":

(c) The 15 January 1991 evaluation by Mr. Moore has five "above average" ratings and this comment "My main press operator. Knows what and when to do the proper things. Not afraid to make a decision".

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[3]Quantity of work, quality of work, learning rate, safety habits, and gets along with supervisor and co-workers.

[4]Above average, average and below average

(d) The 21 May 1991 evaluation by Mr. Moore, the first evaluation done after Mr. Jaggers became upgrade foreman, has five "average" ratings and this comment "Leader. Never a problem";

(e) The 26 July 1991 evaluation by foreman Edward Miller has one "above average" rating (quality of work) and four "average" , with this comment"Very good employee, upgrade foreman. Never misses work. Willing to work overtime when needed";

(f)The 22August 1991 evaluation by Mr. Miller has two "above average" ratings (quality of work and quantity of work) and three "average" with this comment "Very good employee, upgrade foreman"'

(g) The 28 February 1992 evaluation by Mr. Moore has two "above average" ratings (quality of work and quantity of work) and three "average" with this comment "Good operator when allowed to operate his was. When given direction by me he has a problem handling that: and

(h) The last evaluation, dated 15 May 1992 and done by Mr. Miller, has one "above average" rating (quantity of work) and four "average" with this comment "Good employee. He doesn't miss work, works overtime when asked and is upgrade foremen. Does s very good job as foreman>"

17. The last evaluation is signed by complainant on May 21, 1992, the exact same day that Mr. Moore offered e different hourly employee , Roger Linkous , a promotion to a salaried foreman's position. the last day that Mr. Jaggers had worked as an upgrade foreman was May 14, 1992.

C. COMPLAINANT IS NOT SELECTED FOR PROMOTION

18. The parties appear to agree that on 22 May 1992 Roger Linkous, an hourly replacement worker, accepted respondent's offer, tendered the previous day, for promotion to a permanent salaried position. Mr. Linkous continued to work as an hourly employee through 25 May 1992. He was first paid as a salaried employee on 26 May 1992.

19. Though Mr. Linkous had been employed by RAC since 17 December 1990, a little over a month after complainant's start date, he had never worked as an upgrade foreman or leadperson at any time prior to his promotion. Mr. Moore alleged, however, that prior to the labor dispute he interviewed Mr. Linkous for a foreman's position.

20. There is no real dispute that Mr. Linkous was a qualified candidate for promotion. His sixteen performance evaluations between 8 January 1991 and 15 May 1992, all done by Mr. Moore or Mr. Miller, are equal to or slightly better than those of complainant. The comments made by the foremen are worthy of note:

(a) In the first evaluation, dated 8 January 1991, Mr. Moore wrote that Mr. Linkous "seems to hold back like he isn't sure he understands when being taught. Works hard and always ready for more";

(b) A week later, 15 January 1991, Mr. Moore wrote "Maybe one of my best at picking up on the jobs";

(c) On 4 February 1991 Mr. Moore commented that Roger Linkous "Will do very well";

(d) Two weeks later 18 February 1991, Mr. Moore wrote "One of the best. does whatever it takes. Potential Lead

man";

(e) On 13 March 1991, shortly before making complainant the upgrade foreman, Mr. Moore wrote about Mr. Linkous "probably one of my best workers. Knows how to work. Would be a good leader";

(f) On 10 April 1991, Mr. Moore again noted about Mr. Linkous "Hard worker. Potential leader";

(g) Mr. Miller completed three evaluations on 8 June 1991, 26 July 1991 and 22 August 1991, all of which declare Mr. Linkous to be an excellent worker or excellent employee;

(h) On 18 September 1991, some eight months prior to offering Mr. Linkous a foreman's job, Mr. Moore commented that he was "Best employee I have ever had at this plant. Would make a good foreman";

(i) On 21 November 1991, Mr. Moore said that Mr. Linkous was "Best employee in Green Carbon";

(j) On 28 February 1992, less than 2 months prior to the offer, Mr. Moore wrote that Roger Linkous as the "Best employee in Green Carbon. Would make an excellent foreman. Can operate everything in Green Carbon"; and

(k) Finally, on 15 May 1992, just a week prior to the promotion, Mr. Miller rated Mr. Linkous "above average" in two of the five areas of performance (quantity of work and quality of work) and "average" in the remaining three, with this comment"very good employee, does not miss work, works overtime when asked, serves on safety committees and other committees. A dependable, sound employee."

21. The last evaluation of each employee prior to the promotion of Mr. Linkous compare as follows(both done by Mr. Miller on 15 May 1992):

	James Jaggers	Roger Linkous
Quantity of Work	Above Average	Above Average
Quality of Work	Above Average	Above Average
Learning Rate	Average	Average
Safety Habits	Average	Average
Gets Along Well	Average	Average

Neither employee had any absences from work during the evaluation period. Mr. Miller wrote the Roger Linkous was a "very good employee . . . a dependable, sound employee" and that Mr. Jaggers was a "good employee . . does a good job as a foreman."

22. Mr. Moore testified that he only considered two employees, Roger Linkous and James Jaggers, for promotion to the permanent foreman position. It was his decision to select Mr. Linkous.

23. Mr. Moore testified as to several reasons he selected Mr. Linkous, who had never served as upgrade foreman, over Mr. Jaggers:

(a) Mr. Linkous "handled himself" better "in a pressure situation"; and

(b) Mr. Jaggers "was a little bit insecure in his decision making ability".

24. Also, Mr. Moore and Mr. Jaggers both testified that they had gotten into a disagreement regarding complainant's upgrade pay. Mr. Jaggers believed that he should have been paid a s foreman for the entire shift once he was upgraded, regardless of how ling he actually did a foreman's duties. Respondent and Mr. Moore, on the other hand, authorized upgrade pay only for the actual period of time in which he worked as a foreman.

25. O 21 May 1992, the day the promotion was offered to him, Roger Linkous was 32 years old. Mr. Jaggers had just turned 57.

26. The Commission offered the following evidence to show that the reasons given by Mr. Moore to explain his selection of Roger Linkous over complainant are not true:

(a) In his 15 January 1991 evaluation of Mr. Jaggers, Mr. Moore noted that complainant was "not afraid to make a decision";

(b) While Mr. Moore recalled one incident at hearing in which Mr. Jaggers "froze" under pressure, he could not recall this or any other incident at his deposition; and

(c) Mr. Moore, in his deposition, said that Ed Miller and hourly employee David Crawford had told him that they had problems with Mr. Jaggers' performance as upgrade foreman, but both gentlemen testified at hearing that they had no such criticism of Mr. Jaggers and had not heard anyone else complain about him.

27. On 28 February 1992, Mr. Moore, the decision maker in question, evaluated both Mr. Linkous and Mr. Jaggers. The evaluations compare as follows:

	James Jaggers	Roger Linkous
Quantity of Work	Above Average	Above Average
Quality of Work	Above Average	Above Average
Learning Rate	Average	Average
Safety Habits	Average	Average
Gets Along Well	Average	Average

Mr. Moore wrote about complainant "good operator when

allowed to operate his way. When given direction by me he has a problem handling that." In regard Mr. Linkous, Mr. Moore wrote "best employee in Green Carbon. Would make an excellent foreman."

28. The February 1992 evaluations by Mr. Moore show a slight dissatisfaction with Mr. Jaggers and unbridled enthusiasm for Mr. Linkous.

D. THE ANNOUNCEMENT OF MR. LINKOUS' PROMOTION

29. While it is agreed that Mr. Linkous was offered the promotion on 21 May 1992, accepted on 22 May 1992, began working as a salaried foreman on 26 May 1992, and that his promotion was announced at a department meeting, the parties vehemently disagree on to the date that the announcement was made.

30. The Commission and Mr. Jaggers assert that he first became aware of Mr. Linkous being promoted when the promotion was announced at a department meeting on or about 15 June 1992. They assert the following evidence supports their position:

(a) The meeting was held, according to the memory of Mr. Jaggers, two or three days after RAC issued a press release announcing the end of the labor dispute, which was 12 June 1992; and

(b) In his background information sheet filed with the Commission on 4 December 1992, complainant identified 15 June 1992 as the date of discrimination.

31. None of the non-party witnesses could affirmatively identify, with any degree of certainty, the precise date on which

the announcement was made.

32. RAC offered the following evidence tending to show that the announcement occurred on or about 22 May 1992:

(a) Mr. Linkous began work as a foreman on 26 May 1992 and there was no reason to delay announcement of his promotion;

(b) Mr. Jaggers recalls that the meeting was Friday when he was starting the evening shift, which would have been either 22 May 1992 or 18 June, but not 15 June; and

(c) Mr. Linkous recalled that the meeting took place three to four days prior to his official start as a foreman, which was 26 May 1992.

33. As a foreman, Mr. Linkous was retained by RAC when the labor dispute ended and the USW members returned to work on 29 June 1992. Mr. Jaggers, along with all of his fellow replacement workers, was dismissed, though placed on a preferential recall list Mr. Jaggers was recalled by RAC on 15 April 1993 and was still employed by respondent as of the date of hearing.

CONCLUSION OF LAW

1. Complainant James O. Jaggers is an individual claiming to be aggrieved by an unlawful discriminatory practice and is a proper Complainant for the purposes of the West Virginia Human Rights Act, W. Va. Code §5-11-10.

2. Respondent Ravenswood Aluminum Corporation is . and was at all times relevant hereto, an employer and person as defined by the West Virginia Human Rights Act. W. Va. Code §§ 5-11-3(d) and 5-11-3(a), respectively.

3. Under W. Va. Code§ 5-11-10, as it existed in 1992[5], a complaint to the Commission "must be filed within one hundred and eighty days after the alleged act of discrimination" in order to be actionable.

4. The 180 day limitations period for an employee to bring an action under the West Virginia Human Rights Act begins to run on the date when the employer unequivocally notifies the employee of an employment decision adverse to the employee. McCourt v. Oneida Coal Company, Inc., 188 W. Va 647, 425 S.E.2d 602,607(1992); Independent Fire Company No. 1 v. West Virginia Human Rights Commission, Syl. Pt. 2, 180 W. Va. 634, 378 S.E.2d 843 (1989)

5. The memorandum of complaint in this matter having been filed on 11 December 1992, this case was timely filed if Mr. Jaggers received unequivocal notice of Mr. Linkous' selection as foreman on or about 14 June 1992.

6. A complainant's failure to file a complaint within the 180 day limitations period is an affirmative defense for which respondent bears the burden of proof for establishing the critical facts at issue.

7. While it is a very close question, I conclude that respondent showed by a preponderance of the evidence that more likely than not Mr. Jaggers received unequivocal notice of Mr. Linkous' selection as foreman as a department meeting held on 22 May 1992. I base this conclusion on the following:

(a) Mr. Linkousw testified credibly that the announcement took place prior to his official stat date of 26 May

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[5]In 1994 the filing period was extended to 365 days. The Commission has not argued that the amended time period is applicable to this case.

1992;

(b) The date of 22 May 1992 is consistent with Mr. Jaggers testimony that the meeting occurred on a Friday when he was working the evening shift;

(c) Mr. Linkous undeniably began work as a foeman on 26 May 1992, some three weeks prior to Mr. Jaggers' alleged 15 June meeting date; and

(d) The Commission offered no evidence at all that RAC had a reason to or did in fact, delay the announcement of the promotion until almost three weeks after Mr. Linkous began work as a foreman.

8. In order to meet the time requirement of W. Va. Code§ 5-11-10-, Mr. Jaggers was required to file a complaint or memorandum of complaint with the West Virginia Human rights Commission within 180 days after 22 May 1992, or not later than 18 November 1992.

9. The Commission offered no facts or argument that the principles of waiver, equitable estoppel or equitable tolling are applicable in this case.

10. A complaint filed after the period of limitations has expired should be dismissed as untimely, Naylor, supra.

11. The complaint filed herein is DISMISSED for failure to meet the 180 day filing period set forth in W. Va. Code§5-11-10 in 1992.

12. As to the merits of the case, I further conclude that the Commission failed to show by a preponderance of the evidence that age was a fact in the decision to select Mr. Linkous in the over Mr. Jaggers for the position of foreman. Skagg v. Elk Run

Coal, 479 S.E.2d 561 (1996).
This conclusion is based on the following evidence:

(a) The February 1992 evaluations done by Mr. Miller show that Mr. Jaggers had fallen out of this favor, albeit perhaps to a modest degree while Mr. Linkous was performing at a level that earned him "the best employee" in the department distinction:

(b) there was admitted friction between Mr. Moore and complainant regarding his pay as an upgrade foreman: and

(c) There was friction between the two gentlemen over Mr. Jaggers' hesitancy to take direction from Mr. Moore.

13. While the problems between Mr. Moore and Mr. Jaggers were certainly not enough to cause the latter's discharge or even demotion from the position of upgrade foreman, they are true and nondiscriminating reasons for selecting one equally qualified candidate (Mr. Linkous) over another (Mr. Jaggers).

14. For reasons set forth above, the complaint filed by James O. Jaggers against Ravenswood Corporation is DISMISSED.

WV HUMAN RIGHTS COMMISSION

ENTER This 30th day of October, 1997.

MIKE KELLY
Administrative Law Judge
P.O. Box 246
Charleston, WV 25321
(304)344-2493

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

JAMES O. JAGGERS,

Complainant,

v. Docket No. EA-225-93

RAVENSWOOD ALUMINUM CORP.,

Respondent

FINAL ORDER

On May 20, 1998, the West Virginia Human Rights Commissions reviewed the Administrative Law Judge's Final Decision in the above-styled action issued by Administrative Law Judge Mike Kelly. After due consideration of the aforementioned, and after a thorough review of the transcript of record, arguments and briefs of counsel, and the petition for appeal and answer filed in response to the Administrative Law Judge's Final Decision, the Commission decided to , and does hereby, adopt said Administrative Law Judge's Final Decision as its own, without modification or amendment.

It is, therefore, the order of the Commission that the Administrative Law Judge's Final Decision be attached hereto and made a part of this Final Order.

By this Final Order, a copy of which shall be sent by certified mail to the parties and their counsel, and by first class mail to the Secretary of State of West Virginia, the parties are hereby notified that they may seek judicial review as outlined in the "Notice to Right of Appeal" attached hereto.

It is so ORDERED
WEST VIRGINIA HUMAN RIGHTS COMMISSION

Entered for and at the direction of the West Virginia Human Rights Commission this 28th day of May, 1998 in Charleston, Kanawha County, West Virginia.

NORMAN LINDELL
ACTING EXECUTIVE DIRECTOR
WEST VIRGINIA HUMAN RIGHTS COMMISSION

NOTICE OF RIGHT TO APPEAL

If you are dissatisfied with this ORDER, you have a right to appeal it to the West Virginia Supreme Court of Appeals. This must be done within 30 days from the day you receive this Order. If your case has been presented by an assistant attorney general, he or she will not file the appeal for you; you must either do so yourself or have an attorney do so for you. In order to appeal, you must file a petition for appeal with the clerk of West Virginia Supreme Court naming the West Virginia Human Rights Commission and the adverse party as respondents. The employer or the person or entity against whom a complaint was filed. If the appeal is granted to a nonresident of this state, the nonresident of this state, the nonresident may be required to file a bond with the clerk of the supreme court.

IN SOME CASES THE APPEAL MAY BE FILED IN THE CIRCUIT COURT OF KANAWHA COUNTY, but only in: (1) cases in which the Commission awards damages other than back pay exceeding $5,000.00; (2) cases in which the Commission awards back pay exceeding $30,000.00l and (3) Cases in which the parties agree that the appeal should be prosecuted in circuit court. Appeals to Kanawha County Circuit Court must also be filed within 30 days from the date of receipt of this Order.

For a more complete description of the appeal process see West Virginia Code§5-11-11 and the West Virginia Rules of Appellate Procedure.